

JAMES A. RYAN, Employee, v. EAST SIDE BEVERAGE CO. and U.S. INS. GRP./CRUM & FORSTER, Employer-Insurer and EDEX, INC., and ACCEPTANCE INDEMNITY INS. CO., Employer-Insurer, and J.J. TAYLOR DISTRIB. CO. and FIREMAN'S FUND INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 23, 2001

No. [REDACTED SSN]

HEADNOTES

CREDIBILITY - SUBSTANTIAL EVIDENCE. There is no basis in the evidence of record that would require reversal of the compensation judge's specific finding that the employee was a credible witness.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony and the opinions and records of multiple medical experts, supports the finding that the employee sustained a significant, work-related injury to his neck and left shoulder on January 16, 1998.

EQUITABLE APPORTIONMENT - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's equal apportionment of liability for medical expenses between the employee's 1995 and 1998 work injuries.

Affirmed.

Determined by: Johnson, J., Wilson, J., Wheeler, C.J.
Compensation Judge: Bradley J. Behr

OPINION

THOMAS L. JOHNSON, Judge

J.J. Taylor Distributing Company and Fireman's Fund Insurance Company appeal the compensation judge's finding that the employee sustained a personal injury to his cervical spine on January 16, 1998, and the judge's apportionment of liability between the January 1998 and September 1985 personal injuries. We affirm.

BACKGROUND

James A. Ryan, the employee, has worked as a beer route driver/salesman for approximately 29 years.¹ (T. 26.) On September 26, 1985, the employee worked for East Side Beverage Company, insured by U.S. Insurance Group/Crum and Forster. On that date, the employee was delivering beer when he fell, sustaining an injury to his neck and left shoulder. The employee eventually came under the care of Dr. Harry Rodgers, a neurosurgeon. The employee gave the doctor a history of the 1985 injury with continued neck, left shoulder and left arm pain. A CT scan showed a disc herniation at C6-7 with significant impingement of the spinal cord on the left and a central and left-sided disc herniation at C5-6. Dr. Rodgers performed an anterior discectomy and cervical fusion at C6-7 on June 13, 1986. (Pet. Ex. H.) The employee was off work approximately 14 months following the 1985 injury and then returned to work in his regular job as a route delivery driver. (T. 35.)

In November 1989, the employee entered into a settlement with East Side and its insurer. In exchange for a payment of \$25,000.00, the employee settled all claims for benefits arising out of the September 26, 1985 personal injury except claims for future medical expenses which were left open. An Award on Stipulation was filed on November 7, 1989. (C&F Ex. 2.)

On January 25, 1993, the employee sustained another personal injury while working for the employer now called Edex, Inc., and insured by Acceptance Indemnity Insurance Company. The employee testified he fell down some stairs and injured his right shoulder, left hip, both knees, his right back and right hand. (T. 36-39.) As a result of the 1993 injury, the employee ultimately had arthroscopic surgery and osteotomies on both knees, surgery on his left hip and a right rotator cuff repair. (T. 41.) Dr. Bert was the surgeon for all but the left hip surgery. The employee was off work for approximately three and a half years following this injury due to his knee, hip and shoulder problems. (T. 69.) In an unappealed finding, the compensation judge found the employee also sustained a cervical injury on January 25, 1993, but the injury was temporary and resolved by September 1993. (Finding 2.)

On January 16, 1998, the employee was involved in an accident when the truck he was driving collided with a Ford Mustang. On this date, the employer was J.J. Taylor Distributing Company insured by Fireman's Fund Insurance Company. The employee testified he felt immediate symptoms in his neck and left shoulder at the time of the collision. (T. 49.) Following the collision, the employee helped a man and woman out of the damaged Mustang. The employee then drove his truck back to the employer's garage, was interviewed by the highway patrol, completed paperwork and went home for the day. (T. 111-112.)

On January 30, 1998, the employee saw Dr. Chris Tountas for pain and limited motion of the metacarpophalangeal joint of the right index finger. The doctor's office note does not mention the January accident or any neck or shoulder complaints. (C&F Ex. 14.) On April 14, 1998, the employee was examined by a neurologist, Dr. Joel Gedan, on referral by Dr. Bert for a

¹ The employee initially worked for Grain Belt Brewery. When the brewery closed, the employee continued working for East Side Beverage Company, a beer distributor. East Side subsequently changed its name to Edex, Inc. and then J.J. Taylor Distributing Company.

neurologic evaluation concerning neck stiffness and tinnitus. The employee gave Dr. Gedan a history of the January 1998 motor vehicle accident stating he was thrown forward and backward in his truck. The employee reported problems with movement and pain in his left shoulder since that time with neck stiffness and limited movement. The employee also told Dr. Gedan he had an extensive medical history of problems with his back and neck from a prior work injury. Dr. Gedan diagnosed a whiplash-type injury with a flexion/extension injury of the cervical spine and an injury to the left shoulder. The doctor's neurologic examination was essentially normal. Dr. Gedan recommended physical therapy to increase range of motion. (Pet. Ex. E.)

The employee returned to see Dr. Bert on April 24, 1998, with complaints of continuing left shoulder pain. The doctor noted the employee had a positive impingement sign. An MRI scan showed an impingement syndrome with a torn rotator cuff for which Dr. Bert performed surgery on July 21, 1998. The doctor opined the employee's shoulder problems were caused or permanently aggravated by the personal injury on January 16, 1998. Dr. Bert rated a six percent whole body disability secondary to that injury and advised the employee to continue to avoid overhead work with a 10 to 15 pound lifting restriction. (C&F 14.) At some point following the January 1998 injury, the employee returned to work for J.J. Taylor. The employee testified he worked four to six hours a day driving a truck. The job required no lifting or manual labor and paid \$5.00 an hour. (T. 57-58.)

The employee was examined by Dr. Steven S. Lebow, a neurologist, on October 30, 1998, on referral from Dr. Bert. The employee complained of constant stiffness and inability to move his neck, tingling running down the left arm and tinnitus in both ears. The doctor prescribed physical therapy. On February 10, 1999, Dr. Lebow reported an MRI scan, taken on November 19, 1998, showed substantial central stenosis above the level of the employee's prior cervical fusion. He referred the employee to Dr. Christine Cox, a neurosurgeon. A cervical myelogram showed the prior C6-7 fusion with marked narrowing of the C4-5 and C5-6 disc spaces. A CT scan showed marked stenosis at C4-5 on the left, moderate to marked stenosis at C3-4 and C4-5 on the right and moderate to marked stenosis on the left at C5-6 and C7-T1. Dr. Cox concluded the employee might benefit from a surgical decompression at C7-T1 on the left. (Pet. Ex. F.) The employee returned to see Dr. Lebow on July 26, 1999, following an examination by Dr. Cox. Dr. Lebow reported Dr. Cox recommended a C7-T1 surgery. By report dated October 14, 1999, Dr. Lebow opined the employee's January 1998 injury resulted in severe neck discomfort, tinnitus in both ears and tingling down the left arm in an ulnar or C8 distribution. (C&F Ex. 3, Pet. Ex. G.)

The employee filed a medical request on October 14, 1999, seeking approval for the surgery recommended by Dr. Cox. J.J. Taylor and Fireman's Fund denied liability for the employee's claimed cervical condition. In January 2000, the medical request was amended by naming East Side and Edex and their insurers as parties to the action.

Dr. Nolan Segal examined the employee on April 12, 2000, at the request of J.J. Taylor and Fireman's Fund. In a reported dated April 14, 2000, Dr. Segal reviewed the employee's extensive medical records and noted the employee had multiple musculoskeletal problems documented in the medical records. The doctor noted surgical procedures on both knees, arthritic changes in the employee's hips, degenerative disc disease at L5-S1 with spondylolisthesis and stenosis, surgical decompressions of both shoulders with underlying arthritic changes in the

acromioclavicular joints with evidence of impingement syndrome, rotator cuff tears bilaterally, and multi-level cervical degenerative disc disease and stenosis with a prior C6-7 fusion in 1986. The doctor questioned whether the proposed hemilaminectomy at C7-T1 on the left, as proposed by Dr. Cox, would result in any significant resolution of the employee's neck pain and headaches. The doctor opined the surgery may, however, help resolve some of the employee's tingling in the left arm. Prior to proceeding with surgery, the doctor recommended a cervical epidural steroid injection or a possible left C8 nerve root block. If that did not provide any lasting improvement, surgery should then be considered. The doctor stated the employee's radiologic findings predated the January 16, 1998 accident, and opined the employee sustained no new structural injuries to his cervical spine in that accident. Dr. Segal apportioned liability for the employee's cervical condition, 40 percent to the underlying arthritic changes and 60 percent to the 1985 personal injury. The doctor recommended permanent restrictions, but stated none of the restrictions were a direct result of the January 16, 1998 injury. (FFIC Ex. 1.)

On July 27, 2000, Dr. William J. Kane, an orthopedic surgeon, examined the employee at the request of East Side and Crum and Forster. Dr. Kane reviewed extensive medical records, a summary of the employee's deposition and performed a physical examination. The doctor diagnosed multi-level degenerative disc disease at C3-4 through C5-6 and at C7-T1. Dr. Kane stated he would not recommend surgery, but would instead pursue a more aggressive conservative program of management including epidural steroid injections and further diagnostic studies. Dr. Kane apportioned 50 percent of the employee's current problems to his hereditary and genetic predisposition to discogenic deterioration, 35 percent to the 1998 injury, 10 percent to the 1993 injury and 5 percent to the 1985 injury. (C&F Ex. 4.)

The employee was examined by Dr. Michael Lee Smith, an orthopedic surgeon, on September 21, 2000, at the request of Edex and its insurer. Following a review of medical records and a physical examination, the doctor diagnosed osteoarthritis of the shoulders, hips and knees and cervical degenerative disc disease. The doctor stated the employee had pre-existing and substantial multi-level degenerative disc changes in the cervical spine but found no objective evidence of any residuals as a consequence of the January 1998 injury. Rather, the doctor opined this injury caused a cervical sprain/strain syndrome which temporarily aggravated the employee's pre-existing condition. Finally, the doctor agreed a left-sided C7-T1 procedure as recommended by Dr. Cox was indicated, but felt further diagnostic tests should be pursued before surgery. (FFIC Ex. 4.)

Dr. Kane's deposition was obtained on October 2, 2000. The doctor again opined a C7-T1 laminectomy was not reasonable or necessary because the employee would still have symptoms related to his degenerative disc disease at the other cervical levels. Further, a fusion of all the affected levels was not appropriate because the chance of obtaining a solid fusion was remote. Instead, Dr. Kane felt aggressive conservative care was more appropriate. Neither did the doctor believe surgery was a viable alternative in the future because the probability of success was too low and the probability of failure too high. (C&F Ex. 4 at 23-29.) The doctor apportioned 5 percent of the liability to the 1985 injury but opined that 5 percent was not a significant contributing factor. (C&F Ex. 4 at 34-35.) Finally, Dr. Kane opined the employee sustained a Gillette-type personal injury as a result of his work activities with the three employers. In such case, the doctor apportioned 30 percent of the liability to the employee's pre-existing condition, 3

percent to the 1985 injury, 6 percent to the 1993 injury, 21 percent to the 1998 injury and 40 percent to the Gillette injury. The 3 percent apportioned to the 1995 injury was not, in the doctor's opinion, a substantial contributing cause to the employee's current cervical spine condition. (C&F Ex. 4 at 37-39.) The doctor testified the Gillette injury continued up until the time the employee stopped his heavy work as a route driver. (C&F Ex. 4 at 41.)

Dr. Segal's deposition was taken on October 4, 2000. The doctor was asked whether the proposed cervical spinal decompression at C7-T1 as recommended by Dr. Cox would be reasonable and necessary to cure or relieve the affects of the employee's spinal condition. Dr. Segal responded the procedure would not result in a cure of his entire cervical spine condition but might relieve some of the employee's arm symptoms. The doctor testified the C7-T1 level is one level below the C6-7 disc space which was surgically fused in 1986. He stated fusion surgery results in progressive wear and tear degenerative changes in the levels above and below the fusion. (FFIC Ex. 1 at 12 - 15.) The doctor also noted a discrepancy between the oral history provided by the employee and the history in the medical records. More specifically, the doctor found no evidence in the medical record that the employee complained of neck and left arm symptoms immediately following the January 1998 motor vehicle accident. The doctor further testified the medical records showed no evidence of any injury to the neck or any neck complaints until over three months after the accident. The doctor opined the 1999 myelogram and CT scan showed no evidence of any new injury to the cervical spine beyond those changes which pre-existed the 1998 injury. Accordingly, Dr. Segal opined the January 16, 1998 injury neither caused, aggravated or accelerated the employee's cervical spine problems. (FFIC Ex. 1 at 28-29.) Assuming, however, the employee had an immediate onset of neck and arm complaints following the 1998 injury, the doctor would apportion 10 percent of the liability to the 1998 injury. (FFIC Ex. 1 at 54-55.) Finally, Dr. Segal opined the employee did not sustain a Gillette-type injury to his cervical spine between 1985 and the present as opined by Dr. Kane. Further, the doctor opined the employee's work activities from April 1, 1997² through January 1998 were not a significant or aggravating factor to the employee's cervical spine disease. (FFIC Ex. 1 at 34-35.)

The case was heard by a compensation judge on October 5, 2000. In a Findings and Order filed November 1, 2000, and an Amended Findings and Order on November 8, 2000, the compensation judge found the employee sustained a temporary injury to his cervical spine on January 25, 1993, which injury resolved by September 1993. The judge further found the employee sustained a personal injury to his cervical spine on January 16, 1998, but found the employee failed to prove he sustained a Gillette-type personal injury to his cervical spine culminating on January 16, 1998. Finally, the compensation judge apportioned the employee's need for medical care to the cervical spine equally between the 1985 and the 1998 injuries. J.J. Taylor and Fireman's Fund appeal the judge's finding of a cervical injury on January 16, 1998, and the apportionment of liability for medical care.

² Fireman's Fund's insurance coverage of the employee apparently commenced April 1, 1997.

STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

1. Credibility of employee

The compensation judge specifically found the employee was a credible witness. (Finding 5.) The appellants appeal this finding contending the employee's testimony is not credible because it is contrary to his own medical records. Specifically, the appellants point to the employee's testimony that he was able to work without restrictions or substantial difficulties with his neck after the 1986 surgery. The appellants assert this testimony is contradicted by the fact the employee had a fusion surgery resulting in permanent disability. We are not persuaded. The appellants do not assert the employee was untruthful, evasive or not candid in his testimony. "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). We find no evidentiary basis requiring reversal of the compensation judge's credibility finding.

2. January 16, 1998 cervical injury

J.J. Taylor and Fireman's Fund appeal the compensation judge's finding that the employee injured his cervical spine on January 16, 1998. The appellants argue the medical evidence establishes the employee had a genetic predisposition to degenerative arthritis. Further, the employee sustained a significant injury to his cervical spine on September 26, 1985, resulting in a C6-7 fusion, an 11 percent permanent partial disability and an inability to return to work for 14 months. The 1998 motor vehicle accident was, the appellants contend, minor as evidenced by the fact that the employee sought no immediate medical attention and the first medical records documenting cervical complaints are not until April 1998. Further, the appellants argue Dr. Segal's opinion that the employee injured his cervical spine in 1998 lacked foundation. In rendering that opinion, Dr. Segal assumed the employee had significant neck and arm complaints immediately after the January 16, 1998 injury. This assumption, the appellants argue, is unsupported by substantial evidence. For these reasons, the appellants contend the compensation judge's finding is unsupported by substantial evidence and must be reversed. We do not agree.

The employee testified he experienced an immediate onset of neck and left shoulder problems after the January 1998 motor vehicle accident. (T. 48.) The compensation judge found the employee was a credible witness and we have affirmed that finding. When he saw Dr. Gedan on April 14, 1998, the employee gave a history of a whiplash-type injury resulting in pain and problems with movement of his neck and left shoulder. A letter from the employee's therapist to Dr. Bert indicates the employee gave a history of injuring his neck on January 16, 1998. (C&F Ex. 13.) Both Dr. Lebow and Dr. Kane opined the employee sustained a cervical injury in 1998. Assuming the employee had significant neck and arm complaints immediately after the car accident, even Dr. Segal concluded the 1998 injury permanently aggravated the employee's cervical spine. There is, therefore, substantial evidence of record supporting a conclusion that the employee sustained a significant injury to his neck and left shoulder on January 16, 1998. While there is evidence permitting a different conclusion, such evidence is not a basis to reverse the compensation judge. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). Substantial evidence supports the compensation judge's finding and it is, accordingly, affirmed.

3. Apportionment

Finally, J.J. Taylor and Fireman's Fund appeal the compensation judge's equal apportionment of liability for the medical expenses for treatment of the employee's cervical spine between the 1985 and 1998 injuries. They argue this finding is inconsistent with the evidence and the medical testimony in the case.

Equitable apportionment is not purely a medical question but is ultimately a question of fact for the compensation judge. In resolving the apportionment issue, the compensation judge is not bound to choose exclusively from conflicting medical apportionment opinions. Ringena v. Ramsey Action Programs, 40 W.C.D. 880 (W.C.C.A. 1987), summarily aff'd (Minn. March 28, 1988). Factors to be considered in reaching an apportionment decision include, but are not limited to, the nature and severity of the initial injury, the employee's symptoms following the initial injury up to the occurrence of the subsequent injury, and the nature and severity of the subsequent injury. Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 226 N.W.2d 888, 27 W.C.D. 797 (1975). The compensation judge properly considered these factors in reaching his decision.

The 1985 injury was significant since it necessitated a cervical fusion with resulting permanent disability. The employee was, however, able to return to work as a route delivery driver following this injury. Based on the medical records in evidence, the employee apparently had no treatment for his cervical condition until the 1993 injury which temporarily aggravated the employee's cervical condition. Following the 1998 injury, the employee testified that his symptoms were worse. He stated his cervical motion was decreased and the tingling in his arm was worse. (T. 97.) The employee's ability to work was significantly affected by the 1998 injury. Dr. Kane and Dr. Segal both agree the 1998 injury permanently aggravated the employee's condition. The apportionment opinions of the medical evaluators varied dramatically. While the evidence would permit a different result, substantial evidence supports the compensation judge's

apportionment decision and we cannot conclude it was clearly erroneous. Accordingly, the judge's decision is affirmed.